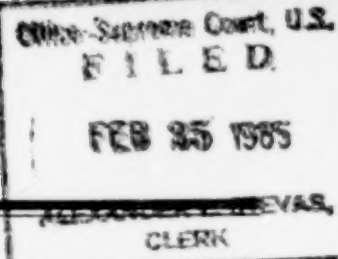


No. 84-476



IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ROBERT McDONALD,
Petitioner,
v.

DAVID I. SMITH,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

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Dated: Graham, NC
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QUESTIONS PRESENTED

1. Can a defendant, who knowingly makes a false statement about an applicant for a Presidential appointment, rely on any privilege provided by the Petition Clause of the First Amendment, even though the statements were published to persons unrelated to the formal appointment process and, if so, is the applicable privilege qualified or absolute?

2. If such a defendant can rely on the privilege but it is not absolute, should this Court now consider whether the Petition Clause requires increased procedural protections, including judicial discretion to award costs and legal fees to a defendant if he ultimately prevails?

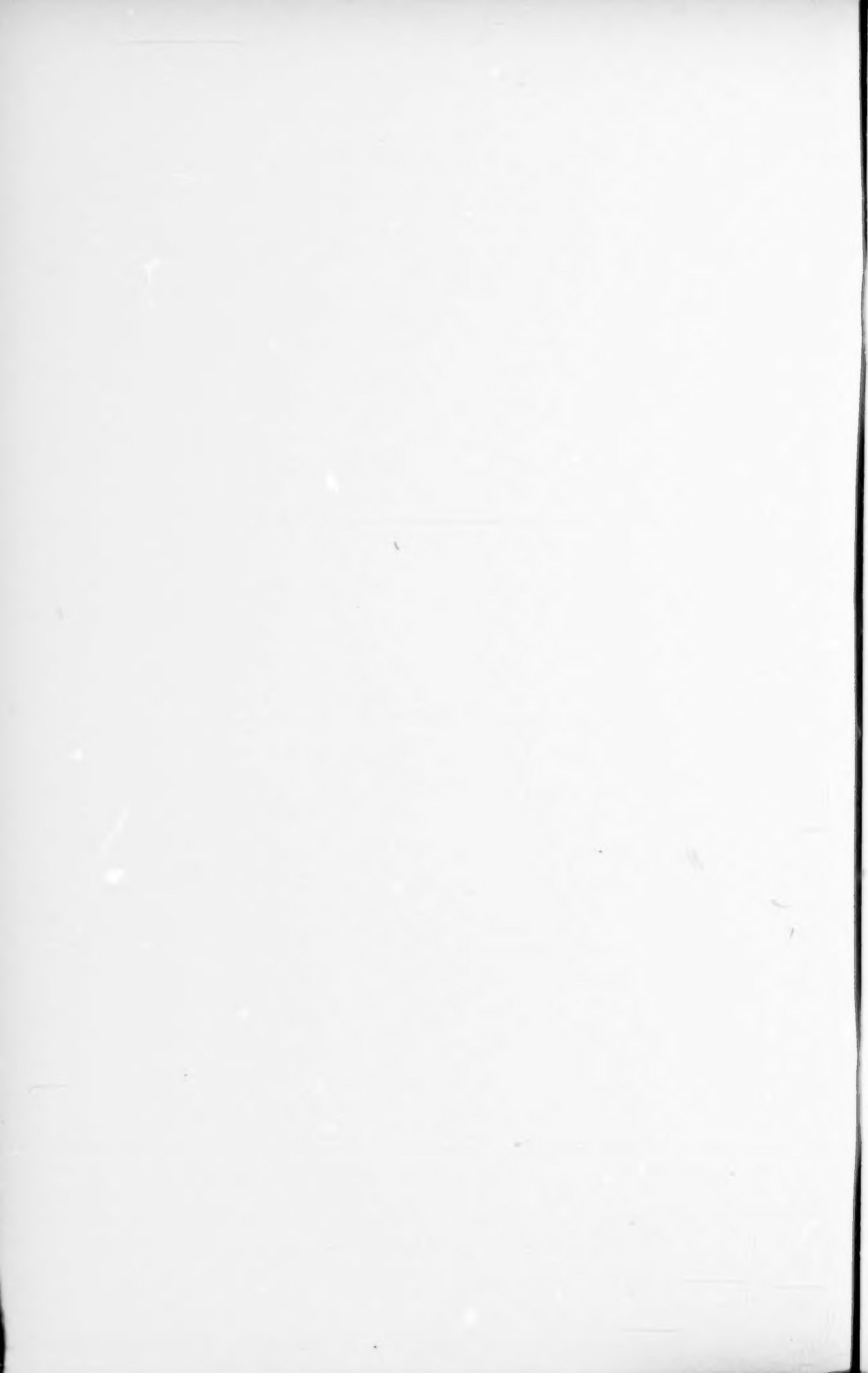


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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In July 1981, Respondent David I. Smith sued Robert McDonald in state court for libel. J.A. 1, 3-7. Smith based his allegations upon two letters, opposing Smith's appointment as United States attorney for the Middle District of North Carolina, written by McDonald on or about December 1, 1980, and February 13, 1981. J.A. 4-5.

McDonald removed the case to federal court, based upon diversity of citizenship. After an unsuccessful summary judgment motion, McDonald answered and moved

for judgment on the pleadings, claiming an absolute privilege from any libel action pursuant to the Petition Clause of the First Amendment. Defendant's Motion for Judgment on the Pleadings Pursuant to Rule 12(c) (July 9, 1982); Defendant's Memorandum in Support of Motion for Judgment on the Pleadings (July 9, 1982). The District Court denied the motion. Petition for Certiorari, App. B (opinion of District Court). McDonald was allowed to appeal and the Fourth Circuit affirmed the denial. *Id.* App. A (opinion of the Fourth Circuit).

The Complaint alleges that McDonald published the letters "kn[owing] that the statements were false," "maliciously," "in reckless disregard to [Smith's] rights and without regard to the truth and with an utter lack of good faith." J.A. 4-7. The letters falsely accused Smith of the following conduct:

- (a) violating the civil rights of various individuals while a Superior Court Judge;
- (b) unlawfully imprisoning persons while he was a Superior Court Judge;
- (c) criminal contempt;
- (d) fraud and conspiracy to commit fraud;
- (e) extortion or blackmail;
- (f) perjury and subordination of perjury;
- (g) professional misfeasance and malfeasance as a practicing attorney and as a Judge of the Superior Court of North Carolina;
- (h) violations of the codes of ethics promulgated and adopted by the American Bar Association and the North Carolina Bar Association;
- (i) wrongfully withholding evidence from the court in actions where he appeared as an attorney;
- (j) violating direct orders of the court in the trial of actions in which he appeared as an attorney;

- (k) violations of professional ethics and dishonesty;
- (l) of being a liar and a cheat; and
- (m) professional misconduct as a Judge of the Superior Court and as a practicing attorney.

J.A. 5-6.

The Complaint alleges that the first libelous letter, dated December 1, 1980, was published to Ronald Reagan, Edwin Meese, Rep. Barry M. Goldwater, Jr., and Rep. Jack Kemp, and to the offices and staffs of Senator Jesse Helms and W. E. Johnson. J.A. 4. The Complaint alleges that the second libelous letter, dated February 13, 1981, was published to President Ronald Reagan, Edwin Meese, Rep. Barry Goldwater, Jr., Senator Jesse Helms, William Webster, and to the office and staff of Rep. W. E. Johnson. J.A. 5. The Complaint further alleges that the letters were read by those and others. J.A. 5, 6. McDonald did not provide Smith with copies of the letters.

The Complaint alleges that these letters contained malicious, knowing falsehoods. "At this stage of the litigation," this Court, "must accept [the Complaint's] allegations as true." *Hishon v. King & Spalding*, 104 S.Ct. 2229, 2233 (1984). McDonald, however, does not appear to recognize that constraint. See, e.g., Brief for Petitioner 2-5 & nn.4, 5, 41 nn.69, 70, 43 n.77 (Jan. 24, 1985) (Petitioner's Brief). In his attempt to argue facts other than the allegations of the Complaint, McDonald claims that "the letters provided, on their face, a ready means for evaluating the truth of most of the statements contained therein by supplying names, addresses, and telephone numbers of persons present at the time, and citations to court records and newspaper articles." *Id.* at 2 n.4. Suffice it to say that resort to those listed sources disproves McDonald's statements and proves McDonald's reckless disregard for the truth. These are matters of proof and Smith readily accepts his burden at trial.

McDonald does not claim that the allegations of the Complaint are insufficient in any regard, absent an absolute privilege under the Petition Clause. Smith denies that the Petition Clause affords any absolute privilege and submits that McDonald waived any available Petition Clause privilege by misdirecting the libel.

SUMMARY OF ARGUMENT

In *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964), this Court ruled that the speech and press clauses of the First Amendment afforded qualified immunity, but not absolute immunity, from actions brought by public officials pursuant to state libel law. McDonald risked liability for his alleged malicious falsehoods under the *New York Times* standard; in his effort to avoid responsibility for his words, therefore, he requests this Court to provide greater protection for his secret letters than the Constitution provides for open, public debate of important government issues. He seeks absolute immunity under the Petition Clause of the First Amendment for secret, malicious falsehoods.

Free speech concerning public affairs is the "essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). McDonald denies that free speech is any part of self-government. Rather, he claims that "petitioning, *unlike speech*, is a direct exercise of a self-governmental function" Petitioner's Brief at 8 (emphasis added). By denying the self-governing function of free speech, McDonald attempts to elevate communications to the servants of the people, government officials, to a higher status than communications among the people, the holders of "absolute sovereignty." *New York Times*, 376 U.S. at 274 (quoting James Madison).

Granting absolute immunity to secret petitions would have far graver effects than allowing McDonald to avoid responsibility for his words or leaving Mr. Smith un-

compensated for his injuries. Absolute immunity for petitions would encourage discussion of public affairs to move out of the light of wide-open, public discourse and into the shadows of secret "petitions." The critic would thereby avoid responsibility for lies and, by secrecy, avoid the occasion of having his lies met with truth.

Nothing in the history of libel, the history of petitioning, the history of the First Amendment, the decisions of this Court, or the circumstances of this case invites skewing the First Amendment to provide absolute protection to secret, malicious lies, simply because they are directed to government officials. And even if such communications should receive absolute immunity from liability for defamation, McDonald waived any such protection for his letters by directing them inappropriately.

Finally, McDonald's arguments regarding procedural protections offend the same First Amendment values as his argument for absolute immunity, and these arguments are not properly before this Court.

ARGUMENT

I. SECRET MALICIOUS LIES ARE MORE OFFENSIVE TO THE FIRST AMENDMENT THAN PUBLIC MALICIOUS LIES, AND DESERVE NO GREATER PROTECTION.

McDonald is not before the Court defending the value of public debate of governmental issues. Rather he seeks absolute protection for the behavior alleged in the Complaint, knowingly false secret "petitions,"¹ which were efforts to marshal clout to harm David Smith. Such secret falsehoods, by their nature, stand apart from the free discussion of governmental affairs that is "indispensable to decisionmaking in a democracy." *First Na-*

¹ McDonald describes his secret "petitions" as "private." Petitioner's Brief at 7.

tional Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

The absolute immunity that McDonald seeks would obstruct the public discussion in the “marketplace of ideas,” *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), that the First Amendment was fashioned to protect.

A. Secret, Malicious Lies Pervert First Amendment Values by Obstructing the Search for Truth.

The First Amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.” *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943) (opinion by Learned Hand, J.).

This Court has declared our “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open” *New York Times*, 376 U.S. at 270. That debate is not limited to truth, because “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’” *Id.* at 379 n.19 (quoting Mill, *On Liberty* (Oxford: Blackwell, 1947), at 15) (emphasis added). Public debate, however, is limited; it excludes false statements made with “‘actual malice’—that is, with knowledge that it [is] false or with reckless disregard of whether it [is] false or not.” *Id.* at 280.²

² McDonald admits that knowing, false statements do not serve the interest of competition for the truth protected by the free speech and press clauses and that such statements do not serve the search for truth when hidden in secret petitions. Petitioner’s Brief at 44 n.78. He relies instead on the status of petition as self-government, a status which he, but not the Constitution, denies speech. *Id.*

McDonald would have the Court declare a rule that would narrow the scope of public debate by encouraging critics of government to seek the absolute immunity of a secret petition. Such a rule would shield discussion of governmental affairs from the bright light of the marketplace of ideas and from other truth-seeking devices built into our system of government.

Marketplace of ideas. "Those who won our independence believed . . . in the power of reason as applied through *public discussion*" *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added). That "power of reason" results from "the robust exchange of ideas and information which is essential to our way of life." *Webb v. Fury*, 282 S.E.2d 28, 47 (W.Va. 1981).

Secret petitions are not counted among Judge Learned Hand's "multitude of tongues." They do not "inform[] the public," *First National Bank v. Bellotti*, 435 U.S. at 777, nor are they any part of the marketplace of ideas.

*Opportunity to respond.*³ "[R]egular and continuing access to the media . . . is one of the accouterments of having become a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979). That access is among the reasons for the lesser protection from libel provided to public figures. "Public officials and public figures usually enjoy significantly greater access to the channels of effec-

³ Cases relied on by McDonald as supporting his claim of absolute privilege not only addressed fact situations where opportunity to respond was provided, but also appear to have relied on the existence of that opportunity. See, e.g., *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1344 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1978) ("[T]he protective machinery of due process hearings is available, with full opportunity to refute that which is unfounded."); *Webb v. Fury*, 282 S.E.2d 28, 39 (W. Va. 1981) ("[R]espondent had ample opportunity to participate in the investigations"). Smith was guaranteed no such opportunity outside this action.

tive communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 344 (1974) (emphasis added).

Media access does not provide any "reasonable opportunity to counteract false statements" that are secretly made. One reason for affording public figures less protection from libel, therefore, simply does not apply to secret petitions.

Other protections. Secret petitions also avoid other truth-seeking protections. McDonald argues that, "[i]f there had been a hearing, [he] could have read the contents of his letters into the public record and he would have enjoyed complete immunity." Petitioner's Brief at 33. He neglects, however, to discuss the controls, other than libel suits, that would have applied to such testimony. McDonald would have been under oath and subject to criminal penalties for perjury. *See, e.g., United States v. Norris*, 300 U.S. 564 (1937). Although Smith would have had no opportunity to cross-examine him, members of the Senate Judiciary Committee would have had that opportunity. Further, Smith would have had opportunity to respond formally to the charges before the committee.

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The resulting "public access to discussion, debate, and the dissemination of information and ideas," *First National Bank v. Bellotti*, 435 U.S. at 783, serves the search for truth.

Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for

arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Anti-Fascist Committee v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

Providing greater protections for secret petitions than for unrestrained, vigorous, public debate would avoid the marketplace of ideas and other truth-seeking devices, defeating a central value of the First Amendment. The First Amendment was not designed to avoid truth; the Constitution provides no absolute immunity from libel for secret petitions.

B. Because Secret Petitions are Less Fundamental to Self-government than is Open Debate of Public Issues, They Deserve No Greater Protection than New York Times Provides Speech.

“‘The people, not the government, possess the absolute sovereignty’” *New York Times*, 376 U.S. at 274 (quoting James Madison). “The right of free public discussion of the stewardship of public officials was thus, in Madison’s view, a fundamental principle of the American form of government.” *Id.* at 275. Citizens, as self-governors, have a “duty to criticize,” and the Constitution protects that duty as free speech. *Id.* at 282.

Public debate was recognized as a duty of self-government from the earliest days of the Republic. “Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.” *Whitney v. California*, 274 U.S. at 375 (Brandeis, J., concurring). It “has long been settled” by the decisions of this Court that the Constitution protects such discussion as free speech. *New York Times*, 376 U.S. at 269. “[S]peech concerning public affairs is more than self-

expression; it is the *essence of self-government*." *Garri-son v. Louisiana*, 379 U.S. at 75 (emphasis added).⁴

McDonald denies that the "essence of self-government" is self-government at all.⁵ Petitioner's Brief at 7, 8, 30.⁶ Upon that denial rests his argument for absolute immunity.

James Madison believed "that the censorial power is in the people over the government, and not in the Government over the people." 4 *Annals of Congress* 934 (1794). If that principle has meaning, communication among the people, the "essence of self-government," must not be relegated to a position inferior to secret petitions. The newly-established American "form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects." *New York Times*, 376 U.S. at 274. Here the sovereignty is in the people; they are the highest authority to which appeal on public issues may be had.⁷ The government, to

⁴ "The freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government." Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245, 252 (1961).

⁵ For instance, McDonald argues that "the right to petition establishes a checking balance between the people-at-large and government." Petitioner's Brief at 27. This Court has recognized, in a free press case, "the function of the First Amendment as a check on legislative power." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978). Thus, the checking function of the First Amendment is not limited to petitioning.

⁶ "Petitioning, *unlike speech*, is a direct exercise of a self-governmental function" Petitioner's Brief at 8 (emphasis added); *id.* at 7 ("Unlike the more general freedoms of speech and press, the right to petition was understood by the Framers of the Constitution and the First Amendment to be a necessary right of a self-governing people.").

⁷ The sovereign people refrained from delegating all power to the government. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

which McDonald would allow publication of malicious lies, "govern[s] us, [but] we, in a deeper sense govern them." Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 257 (1961).

Self-government, be it speech or petition, is not served by the knowing, malicious falsehood McDonald is alleged to have published.

The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. Louisiana, 379 U.S. at 75 (citations omitted); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966) ("[M]alicious libel enjoys no constitutional protection in any context.").

The Court, in *Garrison*, set out the “underpinning” of the *New York Times* holding that the First Amendment “does not bar civil or criminal libel actions for false criticism of the official conduct of a public official if that criticism is made with knowledge of its falsity or in reckless disregard of whether it was false or true.” Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv.L.Rev. 1, 18 (1965) (hereinafter *Brennan on Meiklejohn*).

Free speech is self-government. McDonald, therefore, has no basis for any claim to greater protection than *New York Times* affords. Examination of McDonald’s “fair equivalent” argument readily exposes its misinterpretation of *New York Times*.

McDonald cites *New York Times* as providing a qualified immunity to free speech and press as the “‘fair equivalent of the immunity granted to the officials themselves.’” Petitioner’s Brief at 29 (quoting *New York Times*, 376 U.S. at 283). He continues: “when the citizen is not speaking to the public at large, but is directly exercising his right to petition, and is thus performing a self-governmental function” absolute immunity is required. *Id.* at 30. This Court, however, considered the speech in *New York Times* to be self-government. *New York Times*, 376 U.S. at 282 (“It is as much his duty to criticize as it is the official’s duty to administer.”).

In *New York Times*, this Court balanced the very considerations McDonald now argues. It determined that the “fair equivalent” of the government official’s immunity is a qualified immunity for the self-governing citizen.⁸ The Constitution requires no more protection for

⁸ McDonald makes much of absolute immunities provided government officials, and especially of *New York Times*’ citation to *Barr v. Matteo*, 360 U.S. 564 (1959). See Petitioner’s Brief at 29. *New York Times*, however, holds that qualified immunity is “appropriately analogous to the protection accorded a public official

the self-governing petitioner than it requires for the self-governing speaker.

C. This Court has Protected the Right to Petition While Neither Providing Absolute Immunities Nor Applying Analysis Different from that Applied to Other First Amendment Rights.

This Court has not provided unique protections to speech contained in petitions and has consistently applied the identical analysis to speech, assembly, and petition.⁹ The Court has carefully examined the relationship among these rights in providing a unified approach to their exercise and to attempts at regulation.

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. . . . They are cognate rights, . . . and therefore are united in the First Article's assurances.

Thomas v. Collins, 323 U.S. 516, 530 (1945) (citations omitted).¹⁰

when *he* is sued for libel by a private citizen," and goes on to discuss various levels of immunity provided to public officials. *New York Times*, 376 U.S. at 282. *New York Times*, therefore, determined what sort of immunity would be equivalent to the various immunities available to government officials in different circumstances.

⁹ McDonald presents a semantic argument, distinguishing between the "freedoms" of speech and press as opposed to the "right" to petition. Petitioner's Brief at 10 n.10. This Court has not recognized any such distinction. Furthermore, the First Amendment also describes assembly as a "right" rather than a "freedom," and the Constitution affords no absolute protections to assembly.

¹⁰ McDonald's argument that applying the same constitutional standards to petition and speech would reduce the Petition Clause to "mere surplusage," Petitioner's Brief at 47, ignores both the

The Court has recognized the relationship among these rights in a number of contexts. Addressing the NAACP's cooperative efforts to seek judicial redress of grievances, the Court stated:

We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity.

NAACP v. Button, 371 U.S. 415, 430 (1963).

Similarly, in examining union activities, the Court has not distinguished among these rights; the presence of Petition Clause protections has required no different analysis. "It cannot seriously be doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them" *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1, 5 (1964); see *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) (addressing petitioning with, and no differently from, speech and association); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585 (1971).

Congressional regulation of lobbying was found not to violate "the freedoms guaranteed by the First Amend-

principle stated in *Thomas* and at least one early decision of this Court. In *Crandall v. Nevada*, 73 U.S. 35 (1867), a state tax on persons leaving the state on public transportation was held violative of the right to go to Washington, D.C., to petition the national government. *Id.* at 44. That decision belies McDonald's claim that "[a]ll petition is speech, but not all speech is petition." Petition for a Writ of Certiorari at 18.

ment—freedom to speak, publish, and petition the Government,” without requiring separate analysis of the freedom to petition. *United States v. Harriss*, 347 U.S. 612, 625-26 (1954). See *Reagan v. Taxation With Representation*, 461 U.S. 540 (1983) (examining lobbying as a general First Amendment right).

Similarly, the petition aspects of civil rights demonstrations have been recognized, but they have not required analysis different from that applied to the speech, assembly, and association aspects of the demonstrations. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (“The established elements of speech, assembly, association, and petition, ‘though not identical, are inseparable.’”); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (The demonstrations “reflect an exercise of these basic constitutional rights [free speech, free assembly, and freedom to petition for redress of grievances] in their most pristine and classic form.”); see *Adderley v. Florida*, 385 U.S. 39, 48-56 (1966) (Douglas, J., dissenting).

Significantly, in none of these cases did the Court consider the presence of a Petition Clause right to require any special approach different from that required by other aspects of the First Amendment. Were some absolute immunity associated with petitioning, a different analysis—or no further analysis at all—would have been required. For example, in *Claiborne Hardware*, the Court said:

The presence of protected activity [including petitioning], however, does not end the relevant constitutional inquiry.

Id. at 912 (emphasis added). The Court proceeded to evaluate whether a competing state interest could justify infringing the rights of speech, assembly, association, and petition. *Id.* at 912-15 (especially at 914). Were peti-

tions absolutely immune from state tort liability, no such analysis would have been necessary or appropriate.¹¹

D. No Balancing of Interests Requires Absolute Immunity for Intentional Lies in the Form of Speech or Petition.

McDonald invites the Court to balance federal and state interests to find secret petitions absolutely immune from liability for defamation. Petitioner's Brief at 35-47. Yet, resort to balancing precludes a finding of absolute immunity. "The . . . 'balancing' test[] recognize[s] some governmental power to inhibit speech" *Brennan on Meiklejohn*, 79 Harv.L.Rev. at 11. Furthermore, the Constitution provides no weight to malicious falsehoods when

¹¹ In 1983, the Court shed light on the rationale of several cases involving the Petition Clause that had not appeared to apply analysis used in other First Amendment contexts. Earlier, the Court had established that, although Congress did not intend the antitrust laws to regulate petitioning activity, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961), some petitioning behavior, although "part of the right of petition," was "not necessarily . . . immun[e] from the antitrust laws." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (applying the "sham exception" from *Noerr*). Then, in 1983, the Court ruled that "baseless litigation" in state Courts is subject to regulation pursuant to National Labor Relations Act. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). In *Bill Johnson's Restaurants*, the Court provided:

Just as false statements are not immunized by the First Amendment right to freedom of speech, . . . baseless litigation is not immunized by the First Amendment right to petition.

. . . .

Considerations analogous to these led us in the antitrust context to adopt the "mere sham" exception

Id. at 743-44 (citations omitted). If the Petition Clause does not make petitioning absolutely privileged from federal regulations "[j]ust as" the Speech Clause does not make speech absolutely immune from state regulation, surely the Petition Clause does not make petitioning absolutely immune from state regulation.

balanced against any legitimate competing interest. *Garrison v. Louisiana*, 379 U.S. at 75 ("calculated falsehood" is no part of protected expression).

Proponents of absolute immunity derived from the First Amendment have recognized that the claim of absolute immunity and the balancing of competing interests are mutually exclusive concepts.

In any event, as Justice Brennan observed, "the absolutist view [of the First Amendment prohibitions] has not prevailed within the Court." *Brennan on Meiklejohn*, 79 Harv.L.Rev. at 5.¹² Rather, the Court, over the objections of First Amendment absolutists, has used various "limiting tests," including the "so-called balancing test," *id.* at 9, that McDonald proposes here. See *Gertz v. Robert Welsh, Inc.*, 418 U.S. at 356 (Douglas, J., dissenting); *New York Times*, 376 U.S. at 293 (Black, J., dissenting);¹³ *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting) ("The First Amendment, its prohibition in absolute terms, was designed to preclude courts as well as legislatures from weighing the values of speech against silence."); see also *Brennan on Meiklejohn*, 79 Harv.L.Rev. at 11 ("Dr. Meiklejohn would have none of [the Court's tests, including balancing.]").

McDonald, however, resorts to weighing values even as he calls for absolute immunity. Petitioner's Brief at 35-47. Having done so, he is limited to the weight the Constitution affords the knowing falsehoods he defends. The Constitution provides such communications *no weight* and no protection. *Herbert v. Lando*, 441 U.S. 153, 171 (1979); *Gertz v. Robert Welsh, Inc.*, 418 U.S. at 340;

¹² See, e.g., *Cohen v. California*, 403 U.S. 15, 19 (1971); *Breard v. Alexandria*, 341 U.S. 622, 642 (1951).

¹³ "Probably Mr. Justice Black has been the most eloquent and persuasive proponent of the [the absolutist] view." *Brennan on Meiklejohn*, 79 Harv. L. Rev. at 4.

Garrison v. Louisiana, 379 U.S. at 75; *New York Times*, 376 U.S. at 279-80.

McDonald misconstrues the federal interests in his attempt to give weight to knowing falsehoods. The Court has considered the possible chilling effect the specter of civil liability may have on expression and decided that a defense of truth alone was inadequate and "inconsistent with the First and Fourteenth Amendments." *New York Times*, 376 U.S. at 279 (A truth defense alone "dampens the vigor and limits the variety of public debate.") The Constitution protects against any "chilling effect" by the *New York Times* malice requirement. *Id.* at 279-80. The potential cost of defending a libel action is great, but neither the cost nor its "chilling effect" is greater where the lies are published in secret letters rather than in the *New York Times*. Compare *New York Times* with Petitioner's Brief at 36-40.

Similarly, the occasion to call upon federal officials to participate in discovery is not peculiar to defamation actions. See Petitioner's Brief at 40-42. Indeed, had McDonald's letters been even more broadly published, the discovery to which he objects might well be relevant.

The other "interests" upon which McDonald relies, Petitioner's Brief at 43-45, relate to protecting the flow of knowing, malicious falsehoods to the government. Of course, such communications interfere with, rather than contribute to, the functions of government.¹⁴ The provisions of *New York Times* appropriately address any "chilling effect" on that flow of information.

McDonald understandably fails to mention competing interests other than the state's interest in protecting the

¹⁴ Positions taken by the national government in the course of litigation do not all support immunity for petitioning. Compare Petitioner's Brief at 39-40 & n.68 with *Sure-Tan, Inc. v. NLRB*, 104 S.Ct. 2803 (1984) (informing Immigration and Naturalization Service of status of illegal alien workers found to be unfair labor practice under National Labor Relations Act).

reputation of its citizens. Petitioner's Brief at 45. Other interests, however, outweigh protecting the secret communication of malicious falsehoods. For instance, "[t]he function of libel suits in preventing violence has long been recognized." *Linn v. United Plant Guard Workers*, 383 U.S. at 64 n.6. Furthermore, the rule sought by McDonald would exacerbate the existing disincentive to public service already resulting from public disclosure statutes and confirmation hearings.

Although the competing interests need not be strong to outweigh any interest in knowing, malicious falsehood (especially when secretly communicated), the strength of the interests implicated here has long been recognized by this Court.

The legitimate state interest underlying the law of libel is the compensating of individuals for the harm inflicted upon them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name

"reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

Gertz v. Robert Welsh, Inc., 418 U.S. at 341 (quoting and adopting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)); *Rosenblatt*, 383 U.S. at 86 ("[I]mportant social values . . . underlie the law of defamation."); *Time, Inc. v. Firestone*, 424 U.S. 448, 471 (1976) (Brennan, J., dissenting).

North Carolina recognizes and protects that "basic of our constitutional system." Its constitution provides that

"every person for an injury done him in his . . . reputation shall have remedy by due course of law" N.C. Const. art. I, § 18. That is not to say that North Carolina law provides a remedy for all defamatory falsehoods; it does not. North Carolina was among the states whose limitations on libel were looked to by the Court in formulating the *New York Times* standard. *New York Times*, 376 U.S. at 280 n.20 (citing *Ponder v. Cobb*, 257 N.C. 281, 299, 126 S.E.2d 67, 80 (1962)).¹⁵

Since *New York Times*, this Court "has reiterated its conviction—reflected in the laws of defamation of all the States—that the individual's interest in his reputation is . . . a basic concern." *Herbert v. Lando*, 441 U.S. at 169; *Time, Inc. v. Firestone*, 424 U.S. at 456 (emphasis added) ("accommodation between the public's interest in an uninhibited press and its *equally compelling* need for judicial redress of libelous utterances"); *Gertz v. Robert Welsh, Inc.*, 418 U.S. at 348-49.¹⁶ McDonald too lightly casts the Court's "conviction" aside, arguing only public interest concerns that this Court fully addressed by the protections provided speech, without resort to absolute immunity. See Petitioner's Brief at 45-46; *New York Times*.¹⁷

¹⁵ Interestingly, *Ponder v. Cobb* involved the state court recognizing only a qualified immunity from defamation for criticism of state election officials contained in letters sent to state officers.

¹⁶ Indeed, the Court has facilitated efforts to obtain redress for libel. See, e.g., *Calder v. Jones*, 104 S.Ct. 1482 (1984) (allowing California state courts to exercise jurisdiction over Florida defendants); *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984) (allowing libel plaintiff to prosecute action against non-resident defendant); *Herbert v. Lando*, 441 U.S. 153 (1979) (subjecting editorial process and state of mind of defendant to discovery by libel plaintiff).

¹⁷ Reputation is included within the concept of "liberty" protected from government intrusion by the Fourteenth Amendment. See Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405 (1977); cf. *Paul v. Davis*, 424 U.S. 693 (1976).

McDonald's balancing-of-interests argument fails to provide any support for treating his letters any differently as a petition from the way they would be treated as speech. He merely proposes interests that this Court has found to be adequately protected by free speech analysis and ignores the fact that the federal interests he seeks to protect is in malicious falsehood, which traditionally has been afforded no weight. Most revealing, perhaps, is that he found it necessary to make a balancing test argument, which is necessarily inconsistent with any claimed constitutional guarantee of absolute immunity.

Carefully directing malicious falsehoods to powerful federal officials in a position to cause the greatest resulting harm should not be held out as a safe harbor to those "unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool." *Garrison v. Louisiana*, 379 U.S. at 75.

II. THE FRAMERS' UNDERSTANDING OF COMMON LAW LIABILITY FOR INTENTIONAL FALSEHOODS PUBLISHED AS NON-JUDICIAL PETITIONS PROVIDES NO SUPPORT FOR A CLAIM OF ABSOLUTE PRIVILEGE FROM LIBEL ACTIONS BASED ON THE PETITION CLAUSE.

The record of both recovery of damages for defamation and petitioning the sovereign for redress of grievances extends far into our history, as far, in fact, as records of our history extend.¹⁸ The relevance of historical information to the issue before the Court is limited to the history of the relationship between the two rights.

¹⁸ Compare Petitioner's Brief at 11-16, and Petition for Certiorari at 17-18 & nn.19, 20, with V. Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 549 (1903) ("More than a thousand years ago King Alfred provided that the slanderer should have his tongue cut out, unless he could redeem it with the price of his head."); see Exodus 20:15 ("Thou shalt not bear false witness against thy neighbor.").

The extent to which members of Parliament could, or could not, face criminal liability for petitions to the King sheds little, if any, light on the questions before the Court; it addresses the question of legislative immunity. Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 Colum. L.J. 131, 132-138 (1910) (hereinafter *Veeder*). Indeed, although asserted early, it was often denied, both in fact and as a right. *Id.*; see, e.g., *id.* at 132-33 (denials by the Tudor and Stuart kings: in the 16th century by Elizabeth I, in the 17th century by James I). Legislative privilege came to America not in the Petition Clause, as McDonald urges, but in the Speech and Debate Clause: "[F]or any speech or debate in either House they shall not be questioned in any other place." U.S. Const. art. I, § 6. See *Veeder* at 134-35.

McDonald relies heavily on *Lake v. King*, 1 Saund. 131 (1680), and *Harris v. Huntington*, 2 Tyler 129 (Vt. 1802). Any reliance on *Lake* is misplaced. The petition *Lake* found immune from action for libel was presented to a committee of Parliament as a *judicial* body. *Lake v. King*, 1 Saund. at 132. The immunity found was the judicial immunity of a complaint to a court. See *Veeder* at 138.

Harris v. Huntington, except to the extent it relied upon the Vermont Constitution, was wrongly decided. Huntington had petitioned the Vermont legislature not to reappoint Harris as justice of the peace. The Vermont court examined cases providing judicial immunity, 2 Tyler at 136-37, but then looked to *Lake v. King*, which it considered "more in point." Without addressing the fact that *Lake* was decided upon judicial immunity grounds, the Court found the Vermont legislature analogous to Parliament and the same privilege applicable. *Id.* at 137-143. The Court, however, candidly admitted:

This declaration of the right, with observations already made, might seem to decide the question litigated; but as the point is new, and has been argued

with great but not unbecoming zeal on the part of the plaintiff, and appears to be a question of interest to community at large, which it is desirable should be settled on such grounds as may put it forever at rest, it may not be improper to investigate it further.

Id. at 143-44. And, indeed other courts of the period did "investigate it further." Respondent has found none that provides, as a matter of common law or constitutional law, the absolute immunity McDonald seeks.

In 1806, the South Carolina Supreme Court treated petitioning as having a qualified privilege. *Reid v. Delorme*, 2 Brev. 76 (S.C. 1806) (Defendant had probable ground" to believe the contents of his petition). The Supreme Judicial Court of Massachusetts, in dicta, described the qualified immunity for petitioning:

[A] man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint of libel will not be a libel.

Commonwealth v. Clap, 4 Mass. 163, 169 (1808).

Similarly, in 1809, Chancellor Kent described the holding in *Lake* as relying on the judicial nature of the committee of Parliament and found the absolute privilege provided judicial petitions unavailable to petitions outside the judicial context. *Thorne v. Blanchard*, 5 Johns. 508, 524-25 (N.Y. 1809) (Kent, C.J., dissenting). The majority disagreed with Kent as to the nature of the Council of Appointments to which the petition was sent: Kent believing it not judicial, *id.* at 525; Sen. L'Hommedieu believing it judicial, *id.* at 527; and Sen. Clinton believing it judicial, *id.* at 532. Clearly, McDonald misrepresents the holding of the court when he cites *Thorne* for the proposition that "Kent's position had been rejected

by the New York Court of Errors." Petitioner's Brief at 23. Kent's position was that there was no privilege because the Council was not judicial. L'Hommedieu's position was that the Council was judicial and that malice, of which there was no evidence, could not be presumed. Sen. Clinton agreed that "the case . . . cannot be considered as an ordinary libel, where malice is to be implied from the face of the libel. It was, at all events, incumbent on the prosecutor to prove express libel" *Id.* at 529. The New York court did not reject Kent's position, nor find any absolute common law privilege.

Similarly, in 1815 the Supreme Court of Pennsylvania had opportunity to consider whether a deposition complaining of a public official and delivered to the governor was privileged in a libel action. *Gray v. Pentland*, 2 Serg. & R. 22 (Pa. 1815). The three justices, in separate opinions, all agreed that, if false and published "without probable cause," the words would be actionable. *Id.* at 25, 33 (Yeates, J.); *id.* at 26, 27 (Brackenridge, J.); *id.* at 30 (Tilghman, C.J.).

As other occasions arose to address the question, it became clear that the law was settled:

At all events, petitions, applications, memorials or remonstrances addressed to subordinate legislative or other official bodies, and in general, those addressed to all executive or administrative officers whatsoever, are privileged only if made in good faith.

Veeder at 139 (footnotes and case citations omitted). This conclusion is consistent with the holding of *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), upon which the courts below relied.

Justice Black took a position similar to McDonald's, arguing against a criminal prosecution for libel, citing the right of petition as provided by the English Bill of Rights, the Declaration of Rights of the Continental Con-

gress, and the Petition Clause. *Beauharnais v. Illinois*, 343 U.S. 250, 267-68 (1952) (Black, J., dissenting). Compare *id.* with Petitioner's Brief at 14, 16-18. The Court rejected that argument, pointing out that "libel of an individual was a common law crime, and thus a crime in the colonies" and remained a crime. *Id.* at 254-57 & nn. 4, 5 (opinion of the Court).¹⁹

McDonald's arguments are no more persuasive than Justice Black's. The common law decisions early in the life of the Republic provided redress for those defamed to by knowingly or recklessly false petitions.²⁰

¹⁹ See *Roth v. United States*, 354 U.S. at 483 ("At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.").

²⁰ McDonald's discussion of binding instructions to representatives, and especially his reference to the "people out-of-doors," Petitioner's Brief at 24-27 & n.44, adds nothing to the discussion of the relative importance of speech and petition. The role of the "people out-of-doors" (extralegal, organized, issue-specific riots) had legitimate underpinnings in eighteenth century political thought—both as a voice of the otherwise unrepresented and as a reaction to circumstances for which institutional channels were inadequate. See G. Wood, *The Creation of the American Republic, 1776-1787*, 319-28 (1969) (hereinafter *Creation of the American Republic*); Maier, *Popular Uprisings and Civil Authority in Eighteenth Century America*, in *Essays in Politics and Social Development: Colonial American* 308 (S. Katz ed. 1971) (reprinted from 1970 *Wm. & Mary Quarterly* 3 (1970)) (hereinafter *Popular Uprisings*). The development of representative government and the concern for minority rights defeated the legitimacy of such actions. *Popular Uprisings* at 337 ("[T]he assumptions behind the Americans' earlier toleration of the mob were corroded in republican American.").

Similarly, the right to replace representatives at frequent intervals was deemed sufficient to assure that the will of the people would actually be represented; the battle for binding instructions

III. ANY PRIVILEGE AVAILABLE PURSUANT TO THE PETITION CLAUSE IS UNAVAILABLE TO McDONALD BECAUSE HIS LETTERS WERE MISDIRECTED.

McDonald purports to ask this Court to find immune from common law libel actions only "statements [that] 'touched on' and were relevant to how respondent would exercise the governmental power sought by him, and were contained in a private petition to *federal officials who had authority to take responsive actions.*" Petitioner's Brief at 7 (emphasis added; footnote omitted). That request, if granted here, would fall far short of protecting McDonald from answering for his statements, and this case should still proceed to trial. McDonald neither limited his petition to those "who had authority to take responsive actions," nor to "federal officials."

A. The December 1, 1980, McDonald Letter Was Directed to Private Citizen Ronald Reagan.

The first McDonald letter was addressed to "The Honorable Ronald Reagan, President-Elect of the United States" and dated "December 1, 1980." J.A. 8. Whatever the scope of the First Amendment right to petition, it is necessarily limited by its terms to petitioning "the government." U.S. Const. amend. I. Ronald Reagan was not part of "the government" until January 20, 1981. U.S. Const. amend. XX ("The terms of the President and Vice President shall end at noon on the 20th day of January, . . . and the terms of their successors shall then begin."). McDonald's December 1, 1980, statements, therefore, were directed to private citizen Ronald Reagan. They are, therefore, outside the provision of the Petition Clause and the privilege McDonald now claims.

was lost. See 1 Annals of Congress 144 (Aug. 15, 1789); U.S. Const. amend. I; *Creation of the American Republic* at 190-91.

Neither the history of these concepts, nor the concepts themselves, raises the right to petition to a more exalted position than that of free speech.

In fact, Mr. Reagan was not even President-elect at the time of the first letter. The Constitution provides for Congress to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes." U.S. Const. art. II, § 1, cl. 4. Congress, pursuant to that direction, provided that selection of electors take place on Tuesday following the first Monday in November. 3 U.S.C. § 1. In 1980, electors were chosen on November 4. Congress further provided that the votes of the electors be cast on the first Monday after the second Wednesday in December. 3 U.S.C. § 7. In 1980, electors votes were cast on December 15. Congress set the day electors' votes would be counted as January 6. 3 U.S.C. § 15. In early December 1980, private citizen Ronald Reagan had received no electoral vote.²¹

The electoral system was provided by the Framers, but is no more an archaic hold-over of a former time than the provisions of the First Amendment under which McDonald seeks protection. In fact, several relatively recent amendments to the Constitution have touched upon the electoral process, and left unchanged the system of selecting electors who, in turn, select the President.²²

²¹ Not only was Mr. Reagan not part of the government in early December, 1980, the Constitution recognizes that he might never become President. "If, at the time fixed for the beginning of the term of the President, the President-elect shall have died" U.S. Const. amend. XX § 3. "[I]f the President-elect shall have failed to qualify. . . ." *Id.*

Neither the Constitution nor federal law requires electors to vote for the candidates of their respective political parties. Failure of electors to cast votes as required by state law would raise as yet unresolved questions of federalism and the relationship of the several states with the national government. Declaring that, as a matter of federal constitutional law, a citizen for whom no elector had yet cast a vote was a "federal official[] who had authority to take responsive action" as president or president-elect would ignore the constitutionally mandated electoral system.

²² See U.S. Const. amend. XX (ratified January 23, 1933) (addressing election and terms of the President); *id.* amend. XXII (ratified February 27, 1951) (addressing terms of office of

Further, the Congress has addressed its constitutional responsibilities not only by the quadrennial counting of electors' votes, but as recently as 1948 has enacted legislation pursuant to the electoral college provisions of the Constitution. 3 U.S.C. §§ 1 *et seq.*

In constitutional terms, Mr. Reagan received the December 1, 1980, letter as a private citizen. The Petition Clause of the First Amendment does not protect letters between private citizens.

B. McDonald's Letter was Directed to Other Private Citizens and to Federal Officials Completely Without Authority to Take Responsive Actions.

McDonald seeks to convince the Court that all the alleged recipients of the two McDonald letters were "federal officials who had authority to take responsive actions." Petitioner's Brief at 7. McDonald, however, admits proper allegation of publication, not only to Ronald Reagan when he was a private citizen, but to others who were not, at the time, federal officials and to federal officials who were entirely unrelated to the appointment process.

The staff of Representative W. E. Johnson is alleged to have received the December 1 letter. J.A. 4. Mr. Johnson, however, was not a United States Representative in December 1980. McDonald attempts to avoid that failing of his argument by reference to Mr. Johnson's position on a U.S. attorney candidate "screening committee." Petitioner's Brief at 2. Such a "committee" might have some political status; it has no governmental status. Any attempt to elevate it to a governmental status must fail with regard, at least, to the December 1 letter, be-

the President); *id.* amend. XXIII (ratified March 29, 1961) (providing Presidential electors for the District of Columbia); *id.* amend. XXIV (ratified January 23, 1964) (excluding poll tax requirements in federal election, including for "electors for President").

cause the "committee's" only function was to advise private citizen Reagan.

Edwin Meese is alleged to have received the December 1 letter. J.A. 4. McDonald's claim of official status for Mr. Meese, as to that letter, rests upon his position as chairman of the transition team. Petitioner's Brief at 2 n.3. That status is dependent upon the status of Mr. Reagan, whose transition to the Presidency it was intended to serve. As Mr. Reagan was a private citizen, not yet President-elect, Mr. Meese was a political, not governmental, figure.

The three United States Representatives who are alleged to have received McDonald's letters, Johnson,²³ Kemp, and Goldwater, J.A. 4-5, had no government function related to the appointment of United States attorneys. See Petitioner's Brief at 2 n.3 (claiming no such function for Goldwater and Kemp). Only Senator Helms consistently meets the "arguably in a position to take responsive action" test McDonald sets for himself. See *id.* at 7 n.7. As a Senator, Helms, unlike the Representatives, was required to participate in confirmation of United States attorneys. U.S. Const. art. II, § 2; 26 U.S.C. § 541.

C. McDonald Does Not Claim, and This Court Should Not Grant, Any Petition Clause Immunity for Statements Made to Persons Who Were Not Federal Officials With Authority to Take Responsive Action.

McDonald does not seek immunity for communications "to officials who are not even arguably in a position to take responsive action." Petitioner's Brief at 7 n.7. As he is alleged to have published libel to such persons, the immunity he claims would not immunize his letters.

²³ Johnson received the December letter as a private citizen and the February letter as a congressman.

The qualified immunity actually available for petitions is limited to petitions to officials "having authority to act." 50 Am. Jur. 2d, *Libel and Slander* § 217.²⁴ See Eldredge, *The Law of Defamation* 499 (1978); Restatement (Second) of Torts § 598 comments d, e. See also *Webb v. Fury*, 282 S.E.2d at 39; *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1344 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1978).

As the applicability of *any* privilege is so limited and McDonald seeks no broader application of the novel privilege he claims; no privilege associated with petitioning protects McDonald's letters.

IV. NO INTEREST PECULIAR TO THE PETITION CLAUSE REQUIRES ANY PROTECTION FOR PREVAILING DEFENDANTS GREATER THAN THOSE PROTECTIONS NOW AFFORDED SPEECH.

After listing substantial, broad protections available under the Speech Clause of the First Amendment, McDonald seeks a constitutional basis for allowing attorney's fees to prevailing defendants and a constitutional preclusion of punitive damages. Petitioner's Brief 37-38.

McDonald thereby asks this Court to provide greater protection for secret statements intended to marshall political clout to ruin an individual, without providing opportunity for response or debate, than the Constitution provides for the open, robust exchange of ideas and information. Petitioner's Brief § IV.²⁵ Interestingly, however, McDonald supports his request only with arguments that apply equally, or more convincingly, to speech other than petitions.

²⁴ "[A]ccording to some authorities, [the privilege applies to petitions addressed] to one who the petitioner reasonably believed was entitled to act. . . ." 50 Am. Jur. 2d, *Libel & Slander* § 217.

²⁵ McDonald's argument denies the unified approach this Court has taken to First Amendment rights. See *supra* sec. IC.

Although attorney's fees are not generally available to prevailing defendants under the "American Rule," exceptions exist. In addition to statutory provisions for attorney's fee awards, this Court has recognized that such fees may be awarded against a party who litigates "in bad faith, vexatiously, wantonly or for oppressive reasons. . . ." *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258 (1975). Apparently what McDonald seeks is a constitutional basis for attorney's fees in cases brought and pursued properly and in good faith.

Allowing attorney's fee awards in favor of prevailing defendants and against good faith plaintiffs, like the exclusion of punitive damages, would subvert the goals of the First Amendment. Citizens, whether their motives were praiseworthy or malevolent, would eschew open, public discussion of their grievances against the government. Instead, McDonald's view of the Constitution would encourage citizens to seek the safe refuge of a secret petition. Their targets, and those who disagree, would be foreclosed from directly addressing the secret petition, and the government would have the benefit of only one view of the question.

Petitions to courts are public and provide opportunity for response. Petitions to legislators are typically public, and any resulting action of legislators is public. There is opportunity for opposing legislators to respond and oppose action. Petitions to administrators and administrative agencies pursuant to statute or regulation provide for response. See, e.g., *Webb v. Fury*, 282 S.E.2d at 39; *Stern v. United States Gypsum, Inc.*, 547 F.2d at 1344. One defamed by a secret petition, however, has no opportunity to respond to the libel, no opportunity to clear his name, no opportunity to persuade the government that charges are false.

Providing the "protections" McDonald seeks would drive debate on public issues out of the open, into the darkness of the secret petition. The speaker would be safer, but the intended safeguards in the First Amendment would be subverted and the republic would be on more dangerous ground by far.

Additionally, the questions of attorney's fees and punitive damages are not properly before this Court. First, neither was raised before the District Court in Defendant's Motion for Judgment on the Pleadings (July 8, 1982). *See* Defendant's Memorandum in Support of Motion for Judgment on the Pleadings (July 8, 1982).²⁶ This case is an appeal of the denial of that Motion. Second, neither party has standing to argue these issues. McDonald has not prevailed and been denied attorney's fees, nor has he lost and been subjected to a punitive damages award. These issues should await trial on the merits. *See* U.S. Const. art. III.

CONCLUSION

The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

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²⁶ Neither Court below addressed these questions. *See* Petition for Certiorari, App. A & B.